Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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4. Aboriginal art and the economic currency of law

It is clear that the purpose and function of intellectual property is historically and politically tied to promoting economic incentives. This explains why intellectual property laws are increasingly important components of world trade and the subject of world trade arguments. Beyond the classificatory indices of authorship and originality discussed previously, intellectual property is inescapably deeply imbued with commercial dynamics that dually function to inform and identify intangible subject matter.

Modern intellectual property law approaches and evaluates an object for protection through an integral relationship between property and economics.[1] As discussed earlier, following the eighteenth century literary property case *Donaldson v Becket* (1774),[2] the argument was made that one could identify the harm of taking the property of intellectual labour through the financial benefits that would be deprived to the 'originator' of the work.[3] Economic concerns thus became incorporated as a means for measuring and identifying the loss and thereby worth, of this unique form of commodity.

EDELMAN AND THE COMMODITY FORM

In the last few decades, knowledge itself has become valuable in new kinds of ways. Grosheide explains, that '[c]ultural information has, speaking in economic terms, made the step from product to raw material. This also explains why national governments are now more than ever alert to matters of intellectual property rights. Trade in cultural information or intellectual property rights has become a substantial part of national economies . . .'[4]

Debates and discussions about the knowledge economy, and how to enhance and protect it proliferate. As Drahos suggests:

> We have seen lying at the heart of the knowledge economy are intangible assets – for example, algorithms that drive computers and formulae that underpin chemical processes of production. The intellectual property rules governing the ownership of these assets have been globally and profoundly changed in the last

> twenty years. These rules impact on who can and cannot be an entrepreneur in the knowledge economy.[5]

These debates have taken many forms including: the proliferation of information technologies; the proactive collection and archiving of knowledges; questions regarding the social and cultural impact of knowledge economies; and, most importantly for our discussion here, who 'owns' knowledge in this new economy.

As one instance in the growing awareness of the value of knowledge, Agrawal has considered the privileged position that indigenous knowledge has come to occupy in scientific and development discourses.[6] This reversal of fortunes for indigenous knowledge has led to the development of multiple efforts aimed at collecting, recording and classifying such knowledge as well as the development of extensive and sophisticated storage mechanisms, for instance in digital databases.[7] With the changing recognition of the 'value' and currency of knowledge, the desire to make such knowledge privately and exclusively owned simultaneously increases.

Under such circumstances, critical attention has been directed to understanding the multiple ways in which, owing to the changing modes of recognising the value of knowledge, legal structures have been (re) deployed as strategic mechanisms that establish new forms of control and monopoly privileges over certain forms of knowledge and information. *Information Feudalism: Who Owns the Knowledge Economy?* by Peter Drahos, provides an interpretation of the politics and the effects of increasing economies of knowledge. Information is a valuable resource, and therefore the ownership stakes are high.

> Intellectual property rights are a source of authority and power over informational resources, on which the many depend – information in the form of chemical formulae, the DNA in plants and animals, the algorithms that underpin digital technologies and the knowledge in books and electronic communities. These resources matter to communities, to regions and to the development of states.[8]

It is a reinvigorated knowledge economy that enables the management of increasingly valuable forms of knowledge whilst also positioning such knowledge within a discourse of currency, commodity and law.

The dynamic between intellectual property and the economic process of valuation has been examined by scholars seeking to explain how commodity forms of production function as key informing elements of intellectual property law.[9] Certainly economic considerations were an important element in elevating the concerns of competing booksellers in the literary property debates of the eighteenth century. Not surprisingly in 1920s

Marxist scholars were developing analyses that considered the production of the commodity through the law.[10] In 1979 Bernard Edelman revisited early concerns in the context of intellectual property, considering the development of photography and cinema as new and legitimate kinds of subject matter deserving protection.[11] Edelman was concerned with producing a general theory of the production of such legal categories showing how their inclusion is dependent upon processes of capitalism whereby all aspects of creation are reduced to a commodity form intrinsic to market production.[12]

Edelman's work illustrates how the expansion of property rights is made to new commodity forms. He considers the inclusion of the photograph as a new kind of subject matter in copyright law in France, and argues that it is only through a change in the accepted value of this kind of 'knowledge' and its product (the photograph) that enabled the production of a new category. This changing value was directly tied to its market potential.[13] The strength and utility of Edelman's argument for considering both the inner workings of intellectual property and its social implications is in his exploration of how new subject matter is fashioned to fit into categories for intellectual property protection. Thus from the perspective of economic advantage and the commodity value within the marketplace, interesting parallels can be drawn between Edelman's analysis of the inclusion of the photograph and the inclusion of indigenous knowledge, specifically through the commercial considerations influencing and enhancing the value of Aboriginal art (as the product) in a marketplace of relations. For intellectual property law, Aboriginal art represents a new commodity form, albeit one that plays on its 'age-old' pre-market status.

Edelman's initial concern when considering the development of the law covering photography and cinema, is in understanding how the photographic form 'appropriates the real',[14] that is, it involves the taking of an image that would otherwise exist within the public domain and invests it with property rights. For instance a photograph of a lake or a monument is a reproduction of something that existed as 'real' prior to the photograph capturing it as an image. The image, re-appropriated from the real, then becomes the property of the photographer executed through the mechanical process of taking a photo (where labour has been exerted). Thus the re-appropriated 'real' becomes a recognisable object to the law, which is 'always-already invested with property'[15] because the law anticipates that ownership of the image invariably belongs to someone.

Property is of primary importance here, for it is through the notion of property that creation can be understood: property makes the invisible (creation) visible (through the product – the photograph). In this sense Edelman argues that property as a concept of law is a juridical fiction.

As a fiction it permits the transition from the intangible – 'creation', 'intelligence'; to the tangible – the photograph, the painting, or the work.[16] The tangible is characterised in terms of private property: it can be owned. The presumption here is that the public domain is public property. By capturing an image of the public domain through an act of invisible creation, the negative becomes the private property of the owner. Moreover, the 'real' becomes an object, made into a specific category before the law. For instance copyright legislation recognises the 'photograph' as a particular kind of artistic work.

Analogous to issues of locating the 'original' component of indigenous knowledge and hence satisfying categories of identification within copyright, there was considerable debate as to whether photography constituted an act of 'creative endeavour'. The mechanical process implicit in photography has separated it from previously assumed 'creativity' that produced the tangible painting or literary work. That the camera was a machine disrupted the linearity that had previously constructed the association between the 'creator' and the 'creation' that had been integral to understandings of what constituted an artistic form. As Edelman explains,

> The law recognised only 'manual' art – the paintbrush, the chisel – or 'abstract' art – writing. The irruption of modern techniques of the (re)production of the real – photographic apparatuses, cameras – surprises the law in its quietude of its categories.[17]

To this end, Edelman considers the historical stage wherein the juridical birth of photography and the cinema is made possible. In doing so, he points to the importance of socially bestowing photographers and film makers as 'creators' thus providing the cinematic industry with the benefit of legal protection whereby economic value is invested in the photographer or film maker as a 'creator' and 'owner' of the work. This can be paralleled to Rose's comments about the social production of the 'author' for the purposes of the literary property debates.[18] In short, for the purposes of the law there must be an identifiable individual that can be pinpointed as the legitimate 'owner' of the private property.

Edelman recognises that the economic importance of photography and the cinema lead to a fundamental revision of them within the law. His point is not to describe the economic process but more the way in which 'this process is reproduced within the law and the way in which the law makes it effective'.[19] Thus the law presents itself as responsive to economic demands and capable of reconstructing itself in response. The artistic recognition of the photographer and the recognition that the photographer is a 'creator' was a necessity of the industry. The effectivity of processes making this possible was by proceeding through the 'aesthetic'.[20] The outcome being that

the pseudo-aesthetic is subtly mixed with commercial considerations or as Edelman phrases it 'the aesthetic is subordinated to commerce'.[21]

Like the difficulties with identifying indigenous knowledge as intangible subject matter, photography needed to carry identifiable marks necessary for legal protection. In other words, photography must be made an 'artistic' activity where 'creative labour' has been invested. Photography needs to become understood socially as an artistic product and as all artistic products are always-already subject to the market, the commodity form of the product becomes the production of the artifact. This point can equally be applied to the recognition of Aboriginal art as an artistic product and thus a commodity form. This leads Edelman to observe that, 'art is both "product" and "moment" of capital'.[22]

Edelman's analysis reveals an astute awareness for how the law functions to produce categories that it can understand and work with and how the law is also responsible for circulating these within society. In this sense, the law is not only responsive to the market but also to the cultural conditions that render the applicability of the law in a particular context important. For it is not only the development of the cinematographic industry that makes the production of 'creativity' of the object of photography important, but also that at the time of such debates, there were '50,000 people who live by photography in France'.[23] In this way the law is responsive to the cultural context that facilitates the market. It does not produce the market alone but is implicitly involved with it and its perpetuation.

It follows then that the production of art as commodity is also an act of law and jurisprudence. It is thus unsurprising that legal values regarding Aboriginal art support the social production of economic value in Aboriginal art. Following Edelman's argument, the real that is re-appropriated to produce the product, Aboriginal art, is understood through the intangibility of indigenous knowledge. As Martin Nakata has noted, indigenous knowledge is now understood as an enterprise, an industry, and this social production demands legal response.[24] The commonality in legal approach to photography and Aboriginal art belies the challenge of identifying indigenous subject matter. All the elements that the law needs to classify new subject matter are here, however they are disguised by more prominent concepts of 'tradition', 'indigenous as culture' and perceptions of incommensurate cultural positions. As Colin Golvan comments;

> It had never dawned on me before that for some of the artists, the first time that they saw the waterhole that they were depicting was with me from an aeroplane when we finally found it, using maps to locate it . . . and I only realised then that what they were depicting was from their own sense of, you know, their own imagery . . . they had incorporated it into their own sense of present and the real.[25]

It is this 'real', this imagery, that is precisely what the law works upon to make a subject of property. A key differential however, is that the real – indigenous knowledge, and the product – Aboriginal art, have not been securely abstracted and decontextualised as legal objects. What this then means is that cultural values beyond the economic currency of knowledge continue to exert pressure in how this subject is identified. This generates alternate affects, for example, political issues of cultural identity and integrity become intertwined with the protection of Aboriginal art, the protection of indigenous knowledge and the function of intellectual property law. As a result, these techniques of valuation make it difficult for law to develop reflexivity toward different cultural positions and contexts especially ones indifferent or opposed to the commodification process.

At this stage it is worth further developing a consideration of how Aboriginal art circulates within a commodity discourse: for it is the historical emergence of Aboriginal art into western art spaces that effectively produced Aboriginal art as a commodity replete with new markers of value. Deriving an economic value enables Aboriginal art to be presented as a legitimate form to be protected through intellectual property law. The production of Aboriginal art as a commodity however, complicates the cultural context of the art and consequently means that the cultural differences are only engaged in any legitimate form at the margins of the law. Moreover, concepts such as 'tradition' and 'culture' are emboldened as they help identify and locate the key features that comprise the 'value'. Underlying the protection of Aboriginal art through copyright is its economic value, which has been both culturally and historically produced. Appreciating the varying intersections that inform this position of Aboriginal art as a commodity enables both an understanding of bureaucratic unwillingness to engage fully with the extent of cultural differences in indigenous knowledge as intangible property and the anxiety for the law that this inevitably generates. It is to these further considerations that we will now turn.

Developing a means for calculating the value of the intangible property is a crucial feature that underpins the identification of categories for intellectual property protection. Economic values are implicit within the legal identification of Aboriginal art, justifying its admission within this body of law.[26] In a significant way Aboriginal art is measured through the lens of the western market. Judicial reasoning relies upon and replicates this process of valuation. Interestingly it is the increased commodification of Aboriginal art, culminating in instances of infringement that highlights its newly acquired economic value and status within the market. As Edwin Hettinger explains;

> market value is a socially created phenomenon, depending on the activity (or non activity) of other producers, the monetary demand of producers and the kinds of property rights, contracts and markets the state has established and enforced. The market value of some fruits of labour will differ greatly with variations in these social factors.[27]

Thus, even when the law depends on the economic as a mode of valuing intangible subject matter, it is still culturally and socially produced. Clearly the market value of Aboriginal art has changed over time and it is this change that produced a shift in seeing Aboriginal art in a context of intellectual property protection. This economic rationale provides a means for appreciating the way in which copyright law identifies and embraces 'new' forms of subject matter. It also forms a point by which strategies to contest inappropriate use of Aboriginal art in the marketplace are imagined.

As noted earlier, an important development in the making of modern intellectual property law was in establishing distinct categories for intellectual property protection – for example copyright for artistic expression – where closed and bounded definitions of these categories facilitated their abstraction. Additionally, instead of focusing on the subject matter in the form of the intangible property or the idea because of the difficulty this presented in justifying the right in the property, the law shifted its gaze to consider the visible form that the subject matter created, such as the book or the machine, in other words the tangible expression or product. If we consider indigenous knowledge as the intangible subject matter and Aboriginal art as the product produced through this subject matter, it is the product, the expression of indigenous knowledge in a material form of art, that is the key focus for copyright law.[28] This shifts the process of identification to characteristics held in the tangible form. Nevertheless determining the metaphysical dimensions of the property right still influence the composition of categories despite the fact that this remains an implicit component.

Central to the making of modern intellectual property law was the development of a means to measure the value of the tangible form produced by the intangible subject matter. This was due to the closure of the intangible property owing to the displacement of mental labour in the second half of the nineteenth century.[29] Such a closure brought a shift from the 'doctrine of intellectual property law towards questions of political economy and policy'.[30] The identification of the unique properties of mental labour affected both the categories of intellectual property law and how these categories were explained.[31] On one hand this meant that qualitative judgments about the boundary between categories was rendered ineffective, and for example, the law could no longer sustain an inherent identification process of what characterised a literary process and

consequently what properly belonged as copyright and what didn't.[32] This difficulty, arising from the displacement of mental labour, also impacted on how the separate categories were explained. Intangible property remained a pivotal consideration in organising the categories as they retained distinction through their relative 'value'.[33] The point to emphasise is that there was a modification in how to measure this relative value, that is, through the 'macro-economic value of property rather than, as had been the case previously, the quantity of the mental labour embodied in the property in question'.[34] It became possible to measure value based on the contribution that the intangible 'property' offered to society, a quality increasingly measured through commercial considerations.

This change meant that what was to become important to modern intellectual property law was not the creativity (remembering its displacement) contained within the work, but rather the contribution the work, as property, made within society. This was judged through the language and logic of the economy. Thus value becomes a term associated and circulated within a quasi-natural realm named as 'economic'. To this end, the value of the object was rendered into a form that was calculable through the language and logic of property within the economy.[35] Following these thoughts then, the value of Aboriginal art becomes calculable through its position as property within the marketplace and consequently takes on a commodity form where its movement within the market can be readily traced.

The emergence of Aboriginal art into the market is part of a process of social construction and production wherein the increase in the demand and popularity of indigenous cultural products is a direct effect. Significantly, as Aboriginal art emerged into a western art space two important things occurred. Firstly as part of its engagement with the market the value of Aboriginal art becomes calculable. Secondly, the concept of an (individual) 'artist' or 'creator' in relation to a work is developed. These two factors influence later arguments for Aboriginal art, as artistic work, to be eligible for copyright. Namely the market provided the necessary means for measuring the value of the work and within such a market, Aboriginal art could be classified according to categories of intellectual property law where there was an artistic work and an identifiable artist. As Shelley Wright explains however, this has been at the expense of an appreciation of indigenous subjectivity and experience – for the marketing of indigenous cultural products relies heavily upon imaginary constructions of Aboriginality.[36] I would also add that the concept of an Aboriginal artist has not been fully secured in relation to Aboriginal art. This has much to do with the way in which Aboriginal art has moved from ethnographic spaces into economic frameworks. The value is still dependent upon, and in some circumstances

enhanced by, ethnographic and anthropological readings of Aboriginal cultures and societies.

Aboriginal art has increasingly become marked as a *cultural* commodity. This invisible intangible cultural dimension of indigenous knowledge remains pivotal in the organisation of the tangible product, Aboriginal art, through categories of copyright. The influence of the intangible is dually exerted in the making of the 'cultural' commodity through, for instance, relying upon essential readings of spirituality and tradition. The economic production of Aboriginal art is still dependent upon a complicated, abstract and romantic relationship between indigenous people and their cultural products, where indigenous people are present, but experience, context and subjectivity are reimagined within the market providing complimentary markers of 'authentic' and 'traditional' Aboriginal culture. Certainly the economic potential of indigenous cultural products provides new modes of regulation and increased ways of governing the production of these cultural products and their circulation within a market.[37] However the irony is that with the emergence of Aboriginal art within the commodity market, there remained initially no clear or identifiable artist/author. This was peculiar to the Australian circumstance whereby economic value was generated before the other categories governing the legitimacy of the subject matter, for instance originality and authorship, could be developed and applied.

THE EMERGENCE OF AN ABORIGINAL ART MARKET

The location of Aboriginal art as 'art' within a marketplace has been a relatively recent inscription.[38] As Fred Myers has explored, the making of the Aboriginal art industry is complex because it has been dependent upon a range of interactions between governmental and individual initiatives.[39] Indeed the making of 'Aboriginal art' was integral to its subsequent recognition by laws of intellectual property. For prior to this transformation indigenous artistry was constructed by anthropological and ethnographic knowledges as 'objects' of culture, constituted as non-art captured through the term 'folklore'. Importantly, these historical markers are still powerfully active and have been absorbed into a popular market indirectly influencing the current value of Aboriginal art.[40]

Colonisation in Australia, like in other areas of the Empire, engaged in the active collection of ethnographic and anthropologic 'data' that documented what was then perceived to be 'primitive' cultures and lifestyles thought to be on the wane.[41] While many 'cultural objects' were

collected throughout this early colonial period it is notable that in 1910, anthropologist Baldwin Spencer began collecting Aboriginal bark paintings predominately from Arnhem Land in northern Australia.[42] Over the course of the next ten years, he accumulated over two hundred paintings collected on behalf of the National Museum of Victoria.[43] Spencer actively encouraged art and craft workers in Victoria to visit the museum and 'copy some of the designs of the Australian aborigine [sic]'.[44] In part this was to encourage the generation of a distinctive Australian aesthetic art style that differentiated Australia from Britain.[45] By the 1930s, indigenous styles were apparent in graphic design, fabrics, murals, ceramics and rubber floors. In this period Aboriginal 'art' accompanied by art that copied Aboriginal styles and forms began to appear in cultural spaces other than the museum.

The history of the emergence of Aboriginal art illustrates the extent that the process of copying Aboriginal styles and designs was governmentally and socially endorsed for nearly a century. For example, in 1941, an exhibition was prepared by the Museum of Victoria that sought to demonstrate the application that could be achieved by artists using inspiration from Aboriginal art. The exhibition *Aboriginal Art and its Applications* began with Aboriginal bark paintings and concluded with examples of the application of these styles including work by Margaret Preston and many ceramicists.[46] The art by Preston and others was referred to as 'new' Aboriginal art which was juxtaposed to 'old' Aboriginal art, that is, art done by Aboriginal people. There was a notable distinction between the 'new' author/artist and the communal Aboriginal group featuring little differentiation. 'Old' Aboriginal art was perceived to be timeless and ahistorical: such a construction of 'traditional' Aboriginal culture embodied in Aboriginal art possible because of the absence of the figure of the Aboriginal artist. Significantly this unindividualised (read as communal) character also became an important marker of its commercial value.

In the mid to late 1940s, Albert Namatjira from the Hermannsburg mission in Central Australia gained national recognition as a talented artist. Through his style of watercolour landscapes, Namatjira was individuated from his community.[47] To this end, Namatjira was one of the first Aboriginal people to be positioned as an identifiable individual artist and significantly, an 'author' of his 'artistic' work.[48] In this context it helped that Namatjira was utilising what were popularly held as 'western' aesthetic styles such as watercolours and was thus also participating within a largely European artistic tradition that had already set the relationship between the individual and the work.

In the 1950s the State Gallery of New South Wales began to buy Aboriginal artwork, and in the 1960s Aboriginal art and design appeared

on stamps and banknotes. Ironically, while Aboriginal art was beginning to become representative of 'Australianess', indigenous people were still not citizens of the country.[49] Thomas' observations are pertinent as he observes that cultural colonisation perpetuates itself,

> not by the theft of motifs or art styles that are reproduced . . . but through forging national narratives that situate indigenous people firmly in the past, or in a process of waning; while settlers are identified with what is new and flourishing and promising.[50]

Thus the use of Aboriginal motifs on stamps[51] and banknotes[52] points to an unstable disjuncture. Indigenous artwork is used to create and establish a unique cultural identity, which at the same time denies contemporary indigenous subjectivity precisely because the indigenous subject is constructed as 'traditional' or in the past, unidentifiable from the homogenised group or community.[53] As Marcia Langton explains:

> Although ideas about Aboriginal culture are constantly recirculated and renegotiated in Australian society, many non-indigenous Australians continue to hold to the trope of a 'Stone Age' Aboriginal culture frozen in time. Aboriginal society had been deemed throughout colonial and much of post-Federation Australia to be limited, inflexible, utilitarian, animist and above all, a primitive way of life inexorably doomed to extinction.[54]

The 1970s marked a period of distinct change in the desirability of Aboriginal artwork. This was paralleled by a change in governmental policy: from assimilation to self-determination. The change specifically saw an increased market for Aboriginal artwork by indigenous people as opposed to the style of Aboriginal artwork done by non-indigenous people.[55] With the interest generated out of the Papunya art movement and new kinds of governmental incentives, indigenous artists began to be associated with their own works and emerged as the faces behind the perpetually constructed 'timeless' genre of Aboriginal art. What was also important about this period of Aboriginal art was that the economic value of Aboriginal artworks began to change.[56]

James Clifford has made pertinent observations about the way in which non-western objects have moved from the space of ethnographic specimens to that of major art creations.[57] Clifford's comments provide insights into the processes that have enabled indigenous artistry to be produced as culturally and economically valuable. Clifford aptly notes:

> The 'beauty' of non-western art is a recent discovery. Before the twentieth century many of the same elements were collected and valued for different reasons. In the early modern period, their rarity and strangeness were prized . . .

> the value of exotic objects was their ability to testify to the concrete reality of an earlier stage of human culture, a common past confirming Europe's triumphant present.[58]

Herein lies a central point crucial to understanding the transformation of indigenous objects from ethnographic *specimens* to *works* of artistic merit, facilitating their incorporation as objects of intellectual property protection. This is the shift in register of value: from anthropological and ethnographic specimens to a different economic realm of art/value and inevitably a new kind of commodity. Arguably however, the former is displaced only to return and exert influence in the market where the exotic representation of 'otherness' becomes integral to the economic value of such cultural products. In this light, it could be posited that one of the initial reasons for the increased value of 'traditional' Aboriginal art is that it embodies a perception of otherness, that is it conveys significant mythologised and romantic features of Aboriginal culture to 'outsiders' through an indefinable *essence* of 'tradition'. Wally Caruana points to this factor stating:

> [t]he art of Aboriginal Australia is the *last great tradition* of art to be appreciated by the world at large. Despite being one of the longest traditions of art in the world, *dating back to at least fifty millennia, it remained relatively unknown* until the second half of the twentieth century.[59]

Aboriginal art is valued on one level for its representation of cultural difference. That is, Aboriginal art is art in the western sense, but simultaneously more than art because it is, at least within the market, represented as inherently connected in its context to a religious and spiritual domain. The centrality that Aboriginal art has to Aboriginal life, land and spirituality contributes to how the 'beauty' of the art is produced for the western gaze. A complex interplay exists here, wherein the distinction between the 'aesthetic' value and the anthropological value of Aboriginal art actively contributes to the production of indigenous art in the market. Cultural institutions such as art galleries transformed indigenous 'objects' into artworks, displayed for their aesthetic qualities; by contrast, in museums the same indigenous objects were exhibited in their cultural contexts, maintaining the construction of 'exotic' or 'primitive' peoples. Notably in art galleries explicit cultural background and context is not essential to aesthetic appreciation. It would be a mistake however, to assume that this cultural context is irrelevant to such aesthetic appreciation. Rather it has an implicit function; for the value of Aboriginal art is in its powerful evocation of the religious or Dreaming, a sense of spirituality unknown and difficult to translate. While in museums such an association may have been

achieved through the positioning with other 'artifacts' and ethnographic specimens, in art galleries however, the accompanying 'story' or narrative fulfils such a role by lending an 'authentic spirituality' to the product.

All commodities have markers of value. These markers of value are explicitly linked to economic markets and importantly to popular demand. Once something becomes popularised, its economic value increases which can be demonstrated through the price. Thus over the last twenty years, Aboriginal art has increased in value both nationally and internationally. Initially the value of Aboriginal art could be linked to romantic notions of 'primitive' art and also understanding that the art was representative of Aboriginal traditions existing for 'over a thousand years'. Subsequently the value of the art increased, partly due to production in colonial discourse of markers of Aboriginal art such as its representation of 'tradition'. In this way then Aboriginal art was perceived as authentic if it replicated notions of the 'traditional' artistry and community, and assumed a position that was predominately *a*historical, abstract and imaginary.

Once a product becomes a commodity however, it is standardised to the market. The product, in this case Aboriginal art, enters a realm of economics where it is abstracted from the cultural and physical associations of people and place. Ironically these physical associations sustain the abstraction. In this way, the marker of value reflecting the 'cultural significance' of the art or the cultural differences that it embodies, function to maintain it as a commodity but separated from the context and indeed the actual life of the creative artists themselves. To some extent this explains the striking absence of a speaking voice of the indigenous artists. The creators of the very objects deemed 'powerful' are located outside the discussion; subjectivity is put at the margins as the art is extracted from its social context. This is a perpetuation of what Thomas observed about early use of Aboriginal art where the 'natives were called upon to be present on the walls through their artifacts, but required to be absent in their persons'.[60]

THE IMAGINARY ABORIGINAL

The positioning of art in 'western' society as highly valued cultural artifact is important to the historical emergence and appreciation of Aboriginal artwork as 'good' art.[61] Nevertheless, it remains that underlying such a transition for 'traditional' Aboriginal art is the trope of the 'primitive'.[62] Furthermore in the movement from ethnographic specimens to aesthetic form, the trope is reconstructed and repositioned so that it continues to exert power in art spaces. This is primarily evoked through the evocation of tradition. As George Marcus and Fred Myers observe,

> the art world has largely gone on constructing the 'primitive' even in its post-modern dislocations. At least part of the appeal of Aboriginal acrylic paintings continue to rely on the sense of Aborigines as 'primitives'.[63]

The trope of the 'primitive' denotes difference and otherness. Indeed it is the unique cultural differences presented as underpinning Aboriginal art that contributes to the value of indigenous artwork within the art world.[64] This is necessarily helped by the remoter locations that many indigenous people occupy.[65] The production of indigenous people as occupying the spaces similar to those represented in anthropological texts supports an interpretation of indigenous people, as a generic group, that is timeless and *a*historical.[66] In short, Aboriginal art is produced in an economic market for non-indigenous consumers.[67]

The fetishisation of 'traditional' Aboriginal art within the art market has had consequences for Aboriginal artists residing in cities and regional areas. The 1990s were characterised by the struggle for the recognition of the work of urban artists beyond the paradigm of 'tradition'.[68] Influenced by postmodernism, artists like Tracey Moffatt and Gordon Bennett remain concerned with questions of identity, hybridity and inter-cultural engagement.[69] As Bennett has explained:

> I didn't go to art college to graduate as an 'Aboriginal Artist'. I did want to explore my Aboriginality, however, and it is a subject of my work as much as colonialism and the narratives and language that frame it, and the language that has consistently framed me. Acutely aware of the frame, I graduated as a straight honours student . . . to find myself positioned and contained by the language of 'primitivism' as an 'Urban Aboriginal Artist'.[70]

These artists challenge colonial images and histories and their work often functions as clear postcolonial texts.[71] They bring into view the hierarchies that valued 'traditional' Aboriginal art, whilst also raising key questions about identity and the construction of Aboriginality.

It is these discussions prompted by 'non-traditional' Aboriginal artists that Shelley Wright draws upon to argue that discussions of Aboriginal art seldom engage in a discussion of the meaning of the term Aboriginal.[72] Wright's point is that there is a significant disjuncture between the concept of an Aboriginal person constructed for 'white Australian manufacture, and the reality of Indigenous peoples lives'.[73] This disjuncture results in an 'imaginary Aboriginality' that bares little resemblance to indigenous subjectivity, but powerfully supplies the market with its key symbols of value – tradition and cultural difference. Wright's concern is that the construction of the 'imaginary Aboriginal' within Australia affects how Australian indigenous people then relate, interrelate and maintain

a level of management over their cultural traditions.[74] It narrows the conditions through which indigenous people can actively participate in the discourse.[75]

Wright identifies intellectual property law as the key legal mechanism in the production of a framework that creates and maintains a 'society which sees culture as the object of commodification, alienation and sale'.[76] This echoes the concerns of Martin Nakata about the ways in which the increasing discussions of indigenous knowledge remake this subject as 'a commodity, something of value, something that can be value added, something that can be exchanged, traded, appropriated, preserved, something that can be excavated and mined'.[77] In this context Nakata suggests that the indigenous knowledge enterprise, of which Aboriginal art is part, has everything and nothing to do with indigenous people.[78] Thus Wright and Nakata share a general concern regarding the ways in which indigenous subjectivity, and indigenous knowledges are produced and effectively managed, for instance through legal regimes of intellectual property. Wright takes this one step further in suggesting that the way in which indigenous subjectivity is constructed directly affects the way in which indigenous people see each other, both in regards to collective identity but also individual identity.

Wright is directly interested in the way in which the law further facilitates the construction of the 'imaginary Aboriginal'. By minimising indigenous experience, the law, presented with legal questions regarding 'infringement' and 'copyright' is able to respond because the concern is located and identified as within the capacity of the law. The commonality of indigenous experience is positioned within a market place of relations, and as an effect of exploitative market forces. But if the 'Aboriginal' positioned before the law is imaginary to begin with why is there surprise that the law is unable to accommodate indigenous difference except as 'imaginary Aboriginals'? Under such circumstances, the confining and redefining of Aboriginal culture and cultural products to fit within legal categories of identification is inevitable and predictable.

What is remarkable, and this will be illustrated presently through the case law, is that the law does seek to accommodate indigenous difference and it does this through looking at its points of inclusion. That this is tied to concepts of indigeneity that emphasises 'traditional' and 'authentic' culture where indigenous people reside in remote communities is a result of multiple factors, not least being the trouble that the Aboriginal artists in the copyright cases did reside in remote communities and emphasised the tradition embodied within the paintings in affidavits. The very facts of the case meant that the case law inevitably played right into the stereotypes that deny indigenous diversity. This reveals that the factors of influence at

play here are far more complicated than are first thought. For whilst it may appear that the law is the primary agent consolidating the 'traditional' and timelessness of indigenous art and cultural traditions, certain institutional initiatives, picked up and advocated by Aboriginal people as much as the white bureaucrats, have also contributed to the reification of 'original' and 'authentic' Aboriginal culture, that is at once real as it is false. The character of governance is exposed wherein law both conforms to standards of identification and breaks these. This illustrates the tensions between agencies and the potential for action and change. It is to a greater understanding of these tensions that we will now move.

NOTES

1. This literature is extensive. See K. Maskus, *Intellectual Property Rights in the Global Economy*, Peterson Institute for International Economics: Washington DC, 2000.
2. *Donaldson v Becket* (1774) 4 Burr 2408, 98 Eng. Rep. 252.
3. See Chapter 3. B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, Cambridge University Press: Cambridge, 1999 at 195.
4. F.W. Grosheide, 'When Ideas Take the Stage', (1994) 6 *European Intellectual Property Review* 219 at 219.
5. P. Drahos with J. Braithwaite *Information Feudalism: Who Owns the Knowledge Economy*?, Earthscan Publications Ltd: London, 2002 at 17.
6. See: A. Agrawal, 'Indigenous Knowledge and the Politics of Classification', (2002) 54 (173) *International Social Science Journal* 287.
7. These databases range from the local to the international, with support ranging from NGOs to international researchers and agencies such as the World Bank, UNCTAD, WIPO and UNESCO. The intention is 'to protect indigenous knowledge in the face of myriad pressures . . . [and] to collect and analyse the available information and identify specific features that can be generalised and applied more widely in the service of more effective development and environmental conservation.' Such efforts also position such knowledge in domains where it can be 'refined and privatized through the existing system of patents and intellectual property rights.' A. Agrawal, supra n.6. See also: P. Drahos, 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Collecting Society the Answer?', (2000) 6 *European Intellectual Property Review* 245.
8. P. Drahos with J. Braithwaite, *Information Feudalism*, supra n.5 at 12.
9. See: C. May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?*, Routledge: London and New York, 2000; S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*, State University of New York Press: New York, 1998; P.E. Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?' in Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays in Copyright Law*, Clarendon Press: London, 1994; R.V. Bettig and H.I. Shiller, *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview Press: Boulder, Colorado, 1996; G. Smith and R. Parr, *Valuation of Intellectual Property and Intangible Assets*, John Wiley: New York, 1989.
10. E. Pashukanis, *A General Theory of Law and Marxism* (Arthur, C. (ed)), Ink Links: London, 1968.
11. B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. by Kingdom, E.), Routledge and Keegan Paul: London, 1979. For another discussion of

photography as 'difficult' subject matter see: K. Garnett, 'Copyright in Photographs', (2000) 5 *European Intellectual Property Review* 229.

12. See: P.Q. Hirst, 'Introduction' to B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, Ibid. 1–18.
13. France has a different history in the emergence of intellectual property to that of Great Britain and consequently Australia. For an account of this differing history see: C. Hesse, 'Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793', (1990) 30 *Representations* 109; C. Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789–1810*, University of California Press: Berkeley, 1991. The *Berne Convention for the Protection of Literary and Artistic Works* (1886) standardised copyright protection at an international level. Original signatories included France, United Kingdom, Belgium, Germany, Haiti, Italy, Spain, Switzerland and Tunisia. Australia became a signatory in 1928. See: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works 1886–1986*, Kluwer: London, 1987.
14. B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* supra n.11 at 38.
15. Ibid., at 38.
16. Ibid., at 40.
17. Ibid., at 44. See also: K. Bowrey, 'Copyright, photography and computer works: the fiction of original expression' (1995) 18 (2) *UNSW Law Journal* 278.
18. M. Rose, 'The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship' Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays in Copyright Law*, Clarendon Press: London, 1994.
19. B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, supra n.11 at 49.
20. Ibid., at 50.
21. Ibid., at 50.
22. Ibid., at 57.
23. Ibid., at 50.
24. M. Nakata, 'Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems' (2002) 28 *International Federation of Libraries Association Journal* 281 at 282. See also: C. Nicholls, *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art Exhibition Catalogue*, March 2000.
25. C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. On file with author.
26. This will be explored further in relation to bureaucratic attention to Aboriginal art and the copyright cases.
27. E. Hettinger 'Justifying Intellectual Property' (1989) 18 (1) *Philosophy and Public Affairs* 31 at 38.
28. In Australia to date, there is no indigenous case law beyond art (artistic works).
29. B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911* Cambridge University Press: Cambridge, 1999 at 194. Importantly, the displacement of mental labour and hence creativity was not an exclusion from intellectual property law. They both return to inform the identification of subject matter such as 'originality' discussed in Chapter Two, and novelty in the case of patents. In this way, creativity is repositioned within the law and exerts its influence in subtle forms.
30. Ibid., at 194.
31. Ibid., at 194–195.
32. Ibid., at 194. Sherman and Bently illustrate this point with reference to patents.
33. Ibid., at 195.
34. Ibid., at 195.
35. In another context see T. Mitchell, 'The Work of Economics: How a Discipline Makes its World', (2005) 45 (2) *European Journal of Sociology* 297.
36. S. Wright, 'Intellectual Property and the "Imaginary Aboriginal"' in Bird, G., G.

Martin and J. Neilsen (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press: Sydney, 1996.

37. See: F. Myers, *Painting Culture: The Making of an Aboriginal High Art,* Duke University Press: Durham, 2002. For a striking illustration of this point see the recent submissions and hearings being undertaken for the Senate Standing Committee on Environment, Communication, Information, Technology and Arts Inquiry into Australia's Indigenous visual arts and crafts sector, 2007. [www.ahp.gov.au/hansard/senate/committee/ecita_ctte/indigenous_arts/hearings/index.htm].
38. Elizabeth Coleman has argued that 'Aboriginal art' is itself a western construction. By this she suggests that there may be variant ranges of ontological understandings of painting and art held by indigenous peoples in Australia – ranging from art produced for a market to art as part of traditional interpretative cultural practice. See E. Coleman, 'Aboriginal Painting: Identity and Authenticity', (2001) 59 (4) *The Journal of Aesthetics and Art Criticism* 385.
39. F. Myers, *Painting Culture: The Making of an Aboriginal High Art*, supra n.37.
40. Comments by Marcia Langton extend this observation: 'In sharp contrast to the "typical Australian" as the blue eyed surfie, popular images of Indigenous Australians tend to be negative, but also essentialised. These negative stereotypes are based on a belief that there are inelectable features of "Aboriginality" based on the tradition of "primitivism"'. M. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* [prepared for the Council for Aboriginal Reconciliation] Australian Government Printing Service: Canberra, 1994 at 8.
41. The problem of what now to do with these collections is serious. See J. Anderson and K. Bowrey, 'The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?', unpublished conference paper. On file with author.
42. N. Thomas, *Possessions: Indigenous Art/Colonial Culture*, Thames and Hudson: London, 1999 at 114.
43. Ibid., at 115.
44. Ibid., at 116.
45. This is Thomas' general argument in *Possessions: Indigenous Art/Colonial Culture*, supra n.42.
46. Ibid., at 121–123.
47. The complex positions that Albert Namatjira occupied within Australian society and his own community has been commented on elsewhere. See: J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art*, Hardie Grant Books: Australia, 1999 at 23.
48. The 2003 retrospective of Namatjira's work at the National Gallery, *Seeing the Centre: The Art of Albert Namatjira (1902–1959)* curated by Alison French also illustrates this artistic status. Also see: M. Rimmer, 'Albert Namatjira: Copyright Estates and Traditional Knowledge' (2003) 24 *Incite* 6; and the discussion of this problem by Brenda L. Croft, 'Roundtable Discussion' AIATSIS Seminar Series, *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* 16 June 2002.
49. The 1967 Referendum established Aboriginal and Torres Strait Islander people as citizens of Australia. For an insightful account of this process see: B. Attwood and A. Markus, 'Representation Matters: The 1967 Referendum and Citizenship' Peterson, N., and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge University Press: Cambridge, 1998.
50. N. Thomas, *Possessions: Indigenous Art/Colonial Culture*, supra n.42 at 109.
51. The Albert Namatjira commemorative stamps released June 2002 highlight this juxtaposition, for they simultaneously establish the a sense of cultural identity through motifs but minimise the position of indigenous subjectivity: in this case the disturbing reality of Albert Namatjira's 'acceptance' and rejection within Australian settler society.
52. In 1966, with the introduction of decimal currency, the new one dollar note incorporated an Aboriginal theme in its design. The 'Aboriginal theme' was the work of the artist, David Malangi, however it had been assumed that the work was authorless. Malangi was presented with a fishing kit as compensation. The copyright case, *Yumbulul v*

Reserve Bank of Australia & Others (1991) 21 IPR 481 involved the unauthorised use of Yumbulul's 'Morning Star pole' on the bicentennial ten dollar note. See also: R. Sackville, 'Legal Protection of Indigenous Culture in Australia', (2003) 11 *Cardozo J. Int'l & Comp. L.* 711.

53. One of the artworks in the *carpets case*, George Milpurrurru's 'Goose Egg Hunt' was reproduced as stamps. 'As part of the program for the 1993 International Year for the World's Indigenous People, Goose Egg Hunt was adopted as the design for the 85 cent Australian stamp issued on 4 February 1993. A large number of these stamps were put into circulation, perhaps as many as two to three million' *Milpurrurru & Others v Indofurn Pty Ltd* 30 IPR 209 at 213. Also consider the following comments: 'The present array of Australian coins produced by the Australian Mint displays an interesting collection of icons which can be read, amongst other possible readings, as the colonial positioning of Aboriginal and Torres Strait Islander peoples as "primitives" and wildlife – a species of fauna along with the kangaroo and emu, the echidna, the lyrebird and the platypus. On all Australian coins, as would be expected, the "head" sign depicts the Queen, while on the "tail" side all the coins exhibit fauna. Except, that is, the two dollar coin, which carries a commemorative image of an Indigenous Australian male, which was intended to celebrate the bicentenary of Australia's "settlement".' M. Langton, *Valuing Cultures*, supra n.40 at 8.
54. M. Langton, 'Introduction: culture wars' in Grossman, M. (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians*, Melbourne University Press: Melbourne, 2003 at 81.
55. In particular, this art movement is contemporarily understood as beginning at Papunya, where in the 1960s the art teacher Geoffrey Bardon encouraged members of the Papunya community to depict their imagery and 'sand stories' on canvas using acrylic paints. The Papunya settlement was set up in 1959 and comprised of at least 6 different western desert communities that were governmentally 'moved' to the one location at Papunya. This was part of the broader assimilationist policy at the time. In 1972, the artists at Papunya formed a company, Papunya Tula Artists Pty Ltd. See: J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art*, Hardie Grant Books: Australia, 1999 at 24–25.
56. The auction house Sotheby's annually holds an auction of Aboriginal art where recently artworks by the artists Kumuntjayi Tjapaltjarri and Rover Thomas have sold for over $400,000.
57. J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art*, Harvard University Press: Cambridge, MA, 1988.
58. Ibid., at 227.
59. W. Caruana, *Aboriginal Art*, Thames and Hudson: Singapore, 1993 at 7 [emphasis mine]. This book by Caruana is the most popular title in the Thames and Hudson catalogue and has been translated into six languages.
60. N. Thomas, *Possessions: Indigenous Art/Colonial Culture*, supra n.42 at 210.
61. See also: E. Michaels, 'Bad Aboriginal Art' (1988) 28 *Art and Text* 59. Also see Michaels's work published posthumously *Bad Aboriginal Art: Tradition, Media and Technological Horizons*, Allen and Unwin: Australia, 1994.
62. As Juan Davila has argued, the copying (or appropriation) of Aboriginal themes by non-Aboriginal artists assumes a connection to the 'primitive'. '[Tim] Johnson paints in the manner of an Aborigine, but feels the need to master . . . the cultures outside the dominant model . . . he relies on a rapport with an intuitive primitivism (naturalism?), an affinity with the "savage" mind.' J. Davila, 'Aboriginality: A Lugubrious Game?', (1987) 23 (4) *Art and Text* 53.
63. G. Marcus and F. Myers, *The Traffic in Culture: Refiguring Art and Anthropology*, University of California Press: Berkeley, 1995, at 20.
64. One notable demonstration in the value of the 'otherness' of indigenous art in the western discourse on art is found in the 1984 Museum of Modern Art in New York exhibition, *'Primitivism' in 20th Century Art: Affinity of the Tribal and the Modern.* In one of the many critiques written about the exhibition, Marianna Torgovnick explains that

the exhibition, 'proved that primitive objects exerted great power in the imagination of modern artists and that their forms, themes, and media coincided in interesting ways or were inspirational to one of the great flowerings of the visual arts in Western civilisation. The exhibition's demonstration of how modernism absorbed the primitive was broad, dramatic and stirring.' M. Torgovnick, *Gone Primitive: Savage Intellects Modern Lives*, The University of Chicago Press: Chicago, 1990 at 120.

65. 'According to Djon Mundine, the "spot the primitive" syndrome of some gallery owners and curators has led to their refusal to see classical indigenous art, such as bark paintings, sculpture and dot paintings, in a contemporary sense. Non classical, urban based contemporary art has not been accepted as true or authentic art.' M. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage*, supra n.40 at 14. See also a discussion on the estimated number of 'traditionally orientated' artists living on outstations or other communities as read from the 1991 census: D. Ellinson, 'Unauthorised Reproduction of Traditional Aboriginal Art', (1994) 17 (2) *UNSW Law Journal* 327.
66. J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art*, supra n.57 at 202.
67. S. Wright, 'Intellectual Property and the "Imaginary Aboriginal"', supra n.36 at 129.
68. See for instance: N. Thomas, 'Hierarchies: From Traditional to Contemporary', *Possessions: Indigenous Art/Colonial Culture*, supra n.42. See also: N. Thomas, 'Cold Fusion', (1996) 98 (1) *American Anthropologist* 9.
69. See: Tracey Moffatt's films *Night Cries – A Rural Tragedy* (1989) and *Nice Coloured Girls* (1987). See Gordon Bennett's work, *The Nine Ricochets (Fall Down Black Fella, Jump Up White Fella)* (1990) and *Myth of Western Man (White Man's Burden)* (1992).
70. G. Bennett, 'The Manifest Toe' McLean, I., and G. Bennett, *The Art of Gordon Bennett*, Craftsman House: Australia, 1996 at 58.
71. See: K. Neville, 'Art and Colonial Consciousness: Deconstructing the Colonial Imagination' (2000) 1 (2) *Balayi: Culture, Law and Colonialism* 39; D. Palmer and D. Groves, 'A Dialogue on Identity, Intersubjectivity and Ambivalence', (2000) 1 (2) *Balayi: Culture, Law and Colonialism* 19.
72. Similarly, Marcia Langton aptly illustrates the significant problematics of the term Aboriginal – see Introduction.
73. S. Wright, 'Intellectual Property and the "Imaginary Aboriginal"', supra n.36.
74. Ibid., at 133.
75. Consider the way many conferences convened on 'traditional knowledge and intellectual property' often don't have any indigenous speakers. While it is increasingly difficult to justify indigenous absence in Australia, in European contexts the politics of indigenous representation and the authority to speak remain peripheral issues.
76. S. Wright, 'Intellectual Property and the "Imaginary Aboriginal"', supra n.36 at 147.
77. M. Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems', (2002) 28 *International Federation of Libraries Association Journal* 281 at 283.
78. Ibid., at 282. This concern was reiterated by the 2003 winner of the Twentieth National Aboriginal and Torres Strait Islander Art Award, Richard Bell. His artwork was entitled 'Aboriginal art. It's a white thing.'